IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al.*, Individually and On Behalf Of All Others Similarly Situated,	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-3624**
v.	§	**(Consolidated)**
ENRON CORP., *et al.*,	§	
Defendants.	§	

DEFENDANT RICHARD B. BUY'S MOTION TO DISMISS

Plaintiffs have failed to plead a securities fraud action against Richard B. Buy.[1] The deficiencies in the few allegations against Mr. Buy are obvious under the standards established by this Court and others under Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act (the "PSLRA").

Introductory Statement

The Complaint does not specifically accuse Mr. Buy of any false statements or any self-dealing of any kind. Nor is he alleged to have participated in Enron's accounting or financial reporting. Except for boilerplate (such as the listing of defendants), Mr. Buy is mentioned in only eleven of the Complaint's one thousand thirty paragraphs and seven charts. With respect to scienter, Plaintiffs do not allege (1) what Mr. Buy specifically knew at any point in time, (2) what material undisclosed information Mr. Buy may have known, (3) when or how Mr. Buy became aware of any such undisclosed material information, or (4) any facts giving rise to an inference that Mr. Buy acted

[1]Mr. Buy joins in and incorporates by reference the arguments in the Defendants' Joint Brief Relating to Enron's Disclosures and the Joint Brief of Officer Defendants.

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with the required state of mind. Plaintiffs' allegations of insider trading are also altogether inadequate. Plaintiffs have failed to identify what material inside information Mr. Buy was aware of when he traded or anything suspicious or unusual about Mr. Buy's four sales of Enron stock. Finally, they have not alleged any particularized facts as to how Mr. Buy participated in any scheme to defraud.

In short, Plaintiffs have not met the particularity requirement, the basis requirement, or the strong inference requirement under the PSLRA or Rule 9(b) for pleading an action as to Mr. Buy.

I. THE APPLICABLE PLEADING REQUIREMENTS

The standards applicable to pleading this securities fraud case against Mr. Buy are set forth in the Joint Brief of Officer Defendants, which is incorporated herein by reference. Among the pertinent requirements, as stated by this Court, is "Plaintiffs must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001). As regards alleged misstatements, Plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 865 n.14 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)). It is therefore necessary to examine the "specific" allegations that have been made against Mr. Buy.

II. THE ALLEGATIONS SPECIFICALLY REFERENCING BUY DO NOT MEET RULE 9(b) OR PSLRA PLEADING REQUIREMENTS.

"Specific" allegations about Mr. Buy in the Complaint fall into six categories: (a) his position as Chief Risk Officer for Enron; (b) the fact that he received bonuses; (c) communications

with outside directors; (d) that he was interviewed by Vinson & Elkins in connection with its investigation of the charges of Sherron Watkins; (e) his sales of Enron stock; and (f) the fact that he invoked his Fifth Amendment rights before Congress. Both individually and in the aggregate, these allegations fail to state a claim against Mr. Buy for securities fraud under both Rule 9(b) and the PSLRA.

A. Plaintiffs' Allegations Of Position Are Insufficient To State A Claim.

Plaintiffs assert that Mr. Buy was "Executive Vice President and Chief Risk Officer of Enron since 6/99, Senior Vice President and Chief Risk Officer from 3/99-7/99, and Management [sic] Director and Chief Risk Officer of ECT from 1/98-3/99" (Complaint ¶ 83(i)). They also assert that he was on Enron's Management Committee in 1998 and its Executive Committee in 1999. These allegations are not sufficient to state a claim against Mr. Buy for securities fraud. *See* Section II.A, Joint Brief of Officer Defendants.

B. Bonuses

Plaintiffs assert that Mr. Buy "received bonus payments of over $1.6 million, in addition to his salary, for 1997, 1998, 1999 and 2000 based on Enron's false financial reports and because Enron stock hit certain performance targets." (Complaint ¶ 83(i).) (However, there are no allegations that Mr. Buy had responsibility for or participated in the preparation of Enron's financial reports.) The isolated, cursory allegation concerning Mr. Buy's receipt of bonuses is not sufficient to raise a strong inference of scienter or otherwise state a securities fraud claim against him. *See* Section II.B, Joint Brief of Officer Defendants.

C. Communications With Outside Directors

In paragraph 398, Plaintiffs allege that the outside directors on Enron's Executive, Finance, and Audit Committees were "in frequent contact with Lay, Skilling, Fastow, Buy and Causey to receive information from them about Enron's business." This bare allegation does not, of course, contain anything about what information (if any) one or more outside directors received from Mr. Buy, much less how that information was false or material or connected in any way with the schemes and wrongdoing alleged by Plaintiffs.

D. Vinson & Elkins Investigation

In paragraph 855, Plaintiffs quote extensively from the letter of Vinson & Elkins ("V&E") to Enron that reported on V&E's investigation of Sherron Watkins' charges of improprieties. Among the matters quoted is V&E's report that it had interviewed eleven people, one of whom was Mr. Buy. However, there is no other mention of Mr. Buy in connection with the V&E letter, much less any statement attributed to him or any finding reportedly based on V&E's interview of Mr. Buy. The only statement from the V&E letter that can in any way be associated with Mr. Buy, even very tenuously, is the following: "In summary, none of the individuals interviewed could identify any transaction between Enron and LJM that was not reasonable from Enron's standpoint or that was contrary to Enron's best interests." As to Mr. Buy, this is, at best, a prohibited group pleading. Even if it could be attributed to Mr. Buy, it would fail as a fraud allegation under the PSLRA because it does not allege what he said, how it was false, how he could have known it was false, or how it was material. Further, there is no indication that Mr. Buy had any control over the V&E report.

E. Plaintiffs Do Not Allege Actionable "Insider Trading" by Buy.

In paragraphs 83(i), 84 and 401, Plaintiffs cite trading history of Mr. Buy showing only four days on which he sold Enron stock in an effort to assert an insider trading claim against him. As they do with all "Enron defendants," Plaintiffs attempt to support their "insider trading" claim with the conclusion of their "expert" (Scott D. Hakala) that it was statistically likely that Mr. Buy's limited stock trades were made with "the possession and use of material adverse non-public information." (Complaint ¶ 415.) This "expert analysis" is clearly statistically lacking and does not take into account other material information such as portfolio concentration, vesting dates, and other material individualized trading information. The Hakala Declaration should not even be considered by this Court. *See* Joint Brief of Officer Defendants, Section II.C.2. Plaintiffs' effort to allege insider trading against Mr. Buy fails, and the insider trading claims against Mr. Buy should be dismissed.

Plaintiffs have altogether failed to plead anything about Mr. Buy's stock sales to satisfy the particularity and other requirements of Rule 9(b) and the PSLRA for pleading illegal insider trading, as reviewed in section II.C.1 of the Joint Brief of Officer Defendants. None of the insider trading paragraphs identifies any specific material, non-public information known to Mr.Buy when he made the limited stock sales about which Plaintiffs complain. Plaintiffs only generally allege that Mr. Buy was in possession of some unspecified "adverse undisclosed information." (Complaint ¶ 83(i)). They do not plead that Mr. Buy was aware of any specific non-disclosure; nor do they allege that Mr. Buy was aware of any public misstatement. It is well settled that simply being a member of management does not equate to scienter or knowledge of false statements. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (allegations of motive and opportunity alone are almost always insufficient to establish scienter). This is the kind of generalized, non-specific allegations the

PSLRA outlawed. Paragraph 83(i) is further flawed by the absence of any allegation that the undisclosed information (itself unidentified) was material. The Complaint is devoid of (1) any specific allegations concerning nonpublic information (2) of which Mr. Buy was aware or (3) how he knew the undisclosed information was material or nonpublic. *See In re Securities Litigation BMC Software,* 183 F. Supp. 2d at 916.

Plaintiffs also make no specific allegations regarding how Mr Buy's sales are improper, unusual, or suspicious. The closest Plaintiffs come is to allege that "[t]hese defendants' illegal insider selling escalated massively as Enron's stock moved to more inflated levels during the Class Period and also when internally they knew the scheme was unraveling." This is yet another instance of group pleading, now prohibited by the PSLRA, and clearly does not apply to Mr. Buy's few stock sales.

Beyond that defect, Plaintiffs' asserted insider trading claim against Mr. Buy fails for other reasons. First, Plaintiffs do not allege a "pattern" of trading by Mr. Buy. Plaintiffs point to only four sales in three months of the three-year Class Period by Mr. Buy – thin material from which to weave a pattern. Further, Plaintiffs point to no sales history outside the Class Period against which the relevant sales could be measured. *See In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d at 901-02 (citing *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 987 (9th Cir.), *reh'g and reh'g en banc denied*, 195 F.3d 521 (9th Cir. 1999), for proposition that "stock sales cannot be viewed as 'unusual' where defendant 'ha[s] no significant trading history for purposes of comparison.'")

Second, Mr. Buy's insider trades or "pattern" (such as it is) are inconsistent with Plaintiffs' allegations concerning the trading "pattern" of other Defendants who, according to the Complaint,

were also "aware" of some undisclosed information. Indeed, according to the Complaint, one or more (but not all) of the Defendants collectively sold in almost every month of the Class Period. Plaintiffs then claim that each Defendant's sales "pattern" – although different from the others – somehow supports the same statistically certain inference. If, however, there truly is a specific "pattern" that demonstrates the use of inside information and other Defendants' sales match or establish that pattern, then Mr.Buy's four sales over three different months cannot possibly match that purported pattern. For example, it is patent nonsense for Plaintiffs to allege that Mr.Buy's "pattern" matches the "pattern" of Mr. Lay's trades (which Plaintiffs allege to number in the hundreds), and that both are recognized patterns of trading on inside information. Any trading "matches" this "pattern." Indeed, according to Plaintiffs, every sale by every insider in the three-year Class Period was suspect. Like all "one size fits all" garments, Plaintiffs' claims droop here and pinch there.

Third, the timing of Mr. Buy's few sales is neither suspicious nor unusual. His sales, at various dates after the options vested, are exactly the type of activity that one would expect from a rational investor seeking to diversify his portfolio.[2] To establish "suspicious timing," Plaintiffs must show that Mr. Buy's trades were "at times calculated to maximize personal benefit" to him. *In re Apple Computer Litigation*, 886 F.2d 1109, 1117 (9th Cir. 1989). A recognized example would be the sale of a significant percentage of his shares "immediately before a negative earnings announcement." *See, e.g., Wenger v. Lumisys*, 2 F. Supp. 2d 1231, 1251 (N.D. Cal. 1998).

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[2]Under Plaintiffs' model, however, an Officer Defendant who sold everything as it vested (a not irrational diversification strategy), or simply sold enough to cover taxes on the exercise of options, would automatically be assumed to have traded on illegal inside information, *even if he had no inside information.*

Conversely, sales made before the market peak, after its fall, or at other times not maximizing seller's proceeds, give rise to no inference of scienter. *See Nathenson,* 267 F.3d at 420-21 (sales made when stock well below "class period high" were "so inauspiciously timed" they "d[id] not meet this test"); *Greebel v. FTP Software,* 194 F.3d 185, 206 (1st Cir. 1999) ("timing does not appear very suspicious" where stock not "sold at the high points of the stock price"). "When insiders miss the boat [by selling well off the market peak], their sales do not support an inference" of scienter. *Ronconi v. Larkin,* 253 F. 3d 423, 435 (9th Cir. 2001). Mr. Buy, according to Plaintiffs' own figures, did not sell a share at the market peak, but rather transacted most of his sales at prices more than $15 below that peak.

Plaintiffs' allegation that Mr. Buy sold 81 percent[3] of his holdings during the three-year Class Period establishes nothing where, as here, he is not charged with making any alleged misstatements. *In re Scholastic Corp. Sec. Litig.,* 2000 WL 91939, at *13 (S.D.N.Y. Jan. 27, 2000) (stock sales of eighty percent of holdings by executive that did not make any alleged misstatements did not establish scienter); *Head v. NetManage, Inc.,* 1998 WL 917794, at *5 (N.D. Cal. Dec. 30, 1998) (executives' sales of 76 percent and 94 percent were "insufficient to create the requisite strong inference of scienter in light of the lack of any specific allegations as to their fraudulent conduct, including the lack of any allegation that they personally made any of the fraudulent statements.").

Further, analysis of the alleged percentages of stock sales by Mr. Buy must be placed in the context of the extraordinarily long class period selected by Plaintiffs – 37 months. *See* Joint Brief of Officer Defendants at Section III.A.1. It is obvious that more sales would occur in a three-year

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[3]Among the flaws in Plaintiffs' analysis of Mr. Buy's sales is their mistaken record of a sale of 16,000 shares on May 1, 2000. The SEC Form 4 (attached as Ex. A) gives the correct figure – 1,600 shares.

class period than in a shorter, more reasonable timeframe. A number of courts have found nothing suspicious or alarming in sales of stock by insiders in percentages that, if adjusted to reflect a three-year "window," would dwarf Mr. Buy's sales. *See, e.g., In re Silicon Graphics*, 183 F.3d at 985-86, 987 (sales by some individuals ranging up to 75 percent insufficient to infer scienter even in a fifteen week class period); *Ronconi*, 253 F.3d at 435 (sale of 17 percent of holdings in a seven-month period clearly "not suspicious in amount."); *In re Waste Management, Inc. Securities Litigation*, C.A. No. H-99-2183 (S.D. Tex. Aug. 16, 2001), at *16 & *131 (no basis for strong inference of scienter when individuals sold as much as 39.6 percent in a five-month class period).

In sum, Plaintiffs have not pleaded adequate specific facts to support a claim for insider sales against Mr. Buy.

F. "Fifth Amendment"

In paragraphs 68 and 392, Plaintiffs assert that Mr. Buy, among others, refused to testify before Congress. Absent any record of the questions Mr. Buy declined to answer (and no questions relevant to Plaintiffs' allegations were directed to him), there is no basis for drawing an inference that his invocation of his Fifth Amendment rights is probative of *securities fraud.*

III. PLAINTIFFS' SECTION 20(a) AND 20A CLAIMS AGAINST MR. BUY SHOULD BE DISMISSED.

For the reasons set forth in section III of the Joint Brief of Officer Defendants, Plaintiffs have failed to plead an actionable claim against Mr. Buy under either sections 20(a) or 20A of the Exchange Act.

IV. THE TEXAS SECURITIES ACT CLAIM AGAINST MR. BUY MUST BE DISMISSED.

Finally, Plaintiff Washington State Investment Board Board ("Washington Board"), purporting to represent a "Note Subclass," has sued Mr. Buy under the Texas Securities Act (Fourth Claim for Relief, ¶¶ 1017-1030). That claim should be dismissed as to Mr. Buy:

(1) The Fourth Claim for Relief itself is silent about when the notes in question were offered and when they were purchased by the Washington Board, perhaps deliberately so. According to its Certification,[4] however, Plaintiff Washington Board purchased the notes in question July 7, 1998 – more than three months before the beginning of the alleged Class Period. The offering documents for the notes are also dated July 1998,[5] and the Registration Statement was dated December 1997[6] – both well before the Class Period. Any alleged pre-class period statements cannot constitute actionable securities fraud. *In re International Bus. Machines Corp. Sec. Lit.*, 163 F.3d 102, 107 (2d Cir. 1998) ; *In re Clearly Canadian Sec. Lit.*, 875 F. Supp. 1410, 1420 (N.D. Cal. 1995). Nor can securities fraud claims be based on statements made *after* the offering or purchase. *Id.*

(2) The Fourth Claim for Relief contains, in microcosm and as a final coda, the panoply of pleading defects that exemplify the Complaint as a whole, including conclusory allegations, group pleading, and failure to plead with specificity alleged misstatements or the operative acts of the named defendants. The Claim falls far short of compliance with Rules 8 and 9(b). To cite just one

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[4] Certification of Washington State Board, Schedule A (filed December 20, 2001).

[5] SEC App. Tab 82; *see* Complaint ¶ 612.

[6] SEC App. Tab 83; *see* Complaint ¶ 612.

problem, Plaintiff Washington Board fails to state, or even hint, whether it is suing Mr. Buy as a "seller" under Art. 581-33A, or a "non-selling issuer" under Art. 581-33C, or both, or neither.

(3) Paragraph 1028 appears to assert liability against Mr. Buy as a "control person," apparently under Section F of the Texas statute. "Control person" under the Texas Securities Act has the meaning imported from the federal statutes and cases. *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807, 815 (Tex. App. – Texarkana 1995, writ denied). The general legal standards for control person liability are discussed in the Joint Brief of Officer Defendants, Section III. Paragraph 1028, as well as the rest of the Fourth Cause of Action, is deficient in alleging control on the part of Mr. Buy. And it is extremely doubtful that that defect can ever be cured, inasmuch as Mr. Buy – as of both the Registration Statement in December 1997 and Plaintiff's alleged purchase in July 1998 – was *not* an officer of Enron; rather, as Plaintiffs allege elsewhere in the Complaint (¶ 83(i)), he was "Management Director and Chief Risk Officer of ECT" (the initials for Enron Capital & Trade).

(4) To the extent the Washington Board's Texas Securities Act claim is based upon alleged failure to comply with state requirements for the registration statement (Art. 581-33A(2)), it is preempted by the National Securities Market Improvement Act ("NSMIA"), 15 U.S.C. § 77r(a)(1).[7] The notes which Plaintiff claims it purchased are covered by the Act, because they are debt offerings by an issuer (Enron) whose stock traded on a listed exchange. *Id.* § 77r(b)(1)(C). As a result, any

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[7] Section 77r(a)(1) provides: "Except as otherwise provided by this section, *no law, rule regulation, order, or other administrative action of any State* or any political subdivision thereof– (1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, *shall directly or indirectly apply to* a security that–(A) is a covered security; or (B) will be a covered security upon completion of a transaction . . . ." (emphasis added).

registration-based claim concerning the sale of these notes is preempted by NSMIA. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001).

This claims against Mr. Buy should be summarily dismissed, with prejudice, as should the entire Complaint.

Respectfully submitted,

Jacks C. Nickens
State Bar No. 15013800
1000 Louisiana Street, Suite 5360
Houston, Texas 77002
(713) 571-9191
(713) 571-9652 (Fax)

ATTORNEY-IN-CHARGE FOR DEFENDANT
RICHARD B. BUY

OF COUNSEL:

Paul D. Flack
State Bar No. 00786930
NICKENS, LAWLESS & FLACK, L.L.P.
1000 Louisiana Street, Suite 5360
Houston, Texas 77002
(713) 571-9191
(713) 571-9652 (Fax)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was forwarded to all counsel listed on the attached Exhibit A Service List by e-mail or facsimile on this 8th day of May, 2002.

Paul D. Flack

FORM 4

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

OMB APPROVAL	
OMB Number:	3235-0287
Expires:	September 30, 1998
Estimated average burden hours per response	0.5

☐ Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. See Instruction 1(b).

(Print or Type Responses)

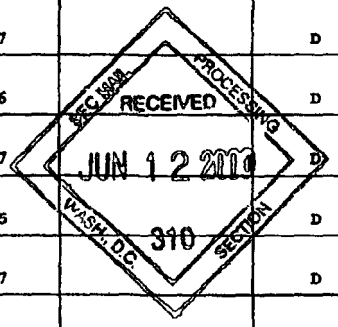
STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

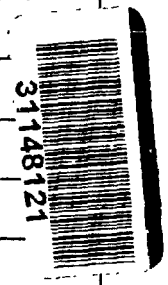
Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(f) of the Investment Company Act of 1940

1. Name and Address of Reporting Person*	2. Issuer Name and Ticker or Trading Symbol	6. Relationship of Reporting Person(s) to Issuer (Check all applicable)
BUY RICHARD B. (Last) (First) (Middle)	ENRON CORP. (ENE)	___ Director ___ 10% Owner
1400 SMITH STREET (Street)	3. IRS or Social Security Number of Reporting Person (Voluntary) 264-11-9790	X Officer (give title below) ___ Other (specify below) EXECUTIVE VICE PRESIDENT AND CHIEF RISK OFFICER
HOUSTON, TEXAS 77002-7369 (City) (State) (Zip)	4. Statement for Month/Year May 2000	7. Individual or Joint/Group Filing (Check Applicable) X Form filed by One Reporting Person ___ Form filed by More than One Reporting Person
	5. If Amendment, Date of Original (Month/Year)	

Table I -- Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Transaction Date (Month/Day/Year)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned at End of Month (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
		Code	V	Amount	(A) or (D)	Price			
Common Stock	05/01/00	M		1,600.00	A	$15.25		D	
Common Stock	05/01/00	S		1,600.00	D	$73.47		D	
Common Stock	05/01/00	M		1,252.00	A	$19.06		D	
Common Stock	05/01/00	S		1,252.00	D	$73.47		D	
Common Stock	05/01/00	M		2,182.00	A	$21.56		D	
Common Stock	05/01/00	S		2,182.00	D	$73.47		D	
Common Stock	05/01/00	M		5,154.00	A	$22.25		D	
Common Stock	05/01/00	S		5,154.00	D	$73.47		D	
Common Stock	05/01/00	M		15,280.00	A	$18.38		D	
Common Stock	05/01/00	S		15,280.00	D	$73.47		D	





Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly
* If the form filed by more than one reporting person, see Instruction 4(b)(v).

(Over)
SEC 1474 (7-96)

SERVICE LIST

Lead Counsel for *Newby* Plaintiffs: William S. Lerach Helen J. Hodges Byron S. Georgiou Milberg Weiss Bershad Hynes & Lerach LLP 401 B Street, Suite 1700 San Diego, CA 92101-5050 (619) 231-1058 (619) 231-7423 (fax) Melvyn I. Weiss Steven G. Schulman Samuel H. Rudman Milberg Weiss Bershad Hynes & Lerach, LLP One Pennsylvania Plaza New York, NY 10119-0165 (212) 594-5300 (212) 868-1229 (fax) Service by e-mail: enron@milberg.com	Local Counsel for *Newby* Plaintiffs: Roger B. Greenberg Schwartz, Junell, Campbell & Oathout LLP Two Houston Center 909 Fannin, Suite 2000 Houston, TX 77010 (713) 752-0017 (713) 752-0327 (fax) Service by e-mail: rgreenberg@schwartz-junell.com
Co-Lead Counsel for *Tittle* Plaintiffs: Lynn Lincoln Sarko Keller, Rohrback, LLP 1201 Third Avenue, Suite 3200 Seattle, WA 98101-3052 (206) 623-1900 (206) 623-3384 (fax) Service by e-mail: lsarko@kellerrohrback.com	Co-Lead Counsel for *Tittle* Plaintiffs: Steve W. Berman Clyde A. Platt, Jr. Hagens Berman, LLP 1301 Fifth Avenue, Suite 2900 Seattle, WA 98101 (206) 623-7292 (206) 623-0594 (fax) Service by e-mail: steve@hagens-berman.com

Local Counsel for *Newby* Plaintiffs: Thomas E. Bilek Hoeffner & Bilek LLP 440 Louisiana, Suite 720 Houston, TX 77002 (713) 227-7720 (713) 227-9404 (fax) Service by e-mail: tbilek722@aol.com	Liaison Counsel for *Tittle* Plaintiffs: Robin Harrison Justin M. Campbell, III Campbell Harrison & Dagley LLP 4000 Two Houston Center 909 Fannin Street Houston, TX 77010 (713) 752-2332 (713) 752-2330 (fax) Service by e-mail: rharrison@chd-law.com
Attorneys for Defendant Jeffrey Skilling: Robert M. Stern O'Melveny & Myers, LLP 555 13th Street, N.W., Suite 500W Washington, DC 20004-1109 (202) 383-5300 (202) 383-5414 (fax) Service by e-mail: rstern@omm.com	Attorneys for Defendant Enron: Kenneth S. Marks Stephen D. Susman Karen A. Oshman Susman Godfrey L.L.P. 1000 Louisiana, Suite 5100 Houston, TX 77002-5096 (713) 651-9366 (713) 654-6666 (fax) Service by e-mail: kmarks@susmangodfrey.com
Attorneys for Defendants Michael J. Kopper, Chewco Investments, LP, LJM Cayman, LP: Eric Nichols Beck, Redden & Secrest, L.L.P. One Houston Center 1221 McKinney, Suite 4500 Houston, TX 77010 (713) 951-3700 (713) 951-3720 (fax) Service by e-mail: enichols@brsfirm.com	Attorneys for Defendants The Northern Trust Company, Northern Trust Retirement Consulting LLC: Linda L. Allison Fulbright & Jaworski, LLP 1301 McKinney, Suite 5100 Houston, TX 77010 (713) 651-5628 (713) 651-5246 (fax) Service by e-mail: laddison@fulbright.com

Attorneys for Defendants David Stephen Goddard, Jr., Debra A. Cash, Michael M. Lowther: Billy Shepherd Cruse, Scott, Henderson & Allen, L.L.P. 600 Travis, Suite 3900 Houston, TX 77002-2910 (713) 650-6600 (713) 650-1720 (fax) Service by e-mail: bshepherd@crusescott.com	Attorneys for Defendants Philip J. Bazelides, Mary K. Joyce, James S. Prentice: Anthony C. Epstein Steptoe & Johnson, LLP 1330 Connecticut Ave., N.W. Washington, DC 20036 (202) 429-3000 (202) 429-3902 (fax) Service by e-mail: aepstein@steptoe.com
Attorneys for Defendant James V. Derrick, Jr.: Abigail K. Sullivan Bracewell & Patterson, L.L.P. South Tower Pennzoil Place 711 Louisiana, Suite 2900 Houston, TX 77002-2781 (713) 223-2900 (713) 221-1212 (fax) Service by e-mail: asullivan@bracepatt.com	Attorneys for Defendant Rebecca Mark-Jusbasche: John J. McKetta III Graves, Dougherty, Hearon & Moody, P.C. 515 Congress Avenue, Suite 2300 P.O. Box 98 78767 Austin, TX 78701 (512) 480-5600 (512) 478-1976 (fax) Service by e-mail: mmcketta@gdhm.com
Attorneys for Defendant Kenneth Lay: James E. Coleman, Jr. Diane Sumoski Carrington, Coleman, Sloman & Blumenthal, LLP 200 Crescent Court, Suite 1500 Dallas, TX 75201 (214) 855-3000 (214) 855-1333 (fax) Service by e-mail: deakin@ccsb.com	Attorneys for Defendants Bank of America Corp., Banc of America Securities LLC: Charles G. King King & Pennington, L.L.P. 711 Louisiana Street, Suite 3100 Houston, TX 77002-2734 (713) 225-8400 (713) 225-8488 (fax) Service by e-mail: cking@kandplaw.com

Attorneys for Defendants Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Charles A. LeMaistre, Wendy L. Gramm, Robert K. Jaedicke, Charles E. Walker, John Wakeham, John Mendelsohn, Paulo V. Ferraz Pereira, Frank Savage, Herbert S. Winokur, Jr., Jerome J. Meyer: Jeremy L. Doyle Robin C. Gibbs rgibbs@gibbs-bruns.com Kathy D. Patrick kpatrick@gibbs-bruns.com Gibbs & Bruns, L.L.P. 1100 Louisiana, Suite 5300 Houston, TX 77002 (713) 650-8805 (713) 750-0903 (fax) jdoyle@gibbs-bruns.com	Attorneys for Defendant John A. Urquhart: H. Bruce Golden Golden & Owens, L.L.P. 1221 McKinney, Suite 3600 Houston, TX 77010 (713) 223-2600 (713) 223-5002 (fax) Service by e-mail: golden@goldenowens.com
Pro se: Dr. Bonnee Linden Linden Collins Associates 1226 West Broadway P.O. Box 114 Hewlett, NY 11557 (516) 295-7906 Service by Federal Express	Attorneys for Defendant Ken L. Harrison: William F. Martson, Jr. Tonkon Torp, LLP 888 S.W. Fifth Ave., Suite 1600 Portland, OR 97204-2099 (503) 802-2005 (503) 972-7407 (fax) Service by e-mail: enronservice@tonkon.com
Carolyn S. Schwartz United States Trustee, Region 2 33 Whitehall St., 21st Floor New York, NY 10004 (212) 510-0500 (212) 668-2255 (fax) Service by fax	Attorneys for Defendant Andrew Fastow: Craig Smyser Smyser Kaplan & Veselka, L.L.P. 700 Louisiana, Suite 2300 Houston, TX 77002 (713) 221-2300 (713) 221-2320 (fax) Service by e-mail: enronservice@skv.com

Attorneys for Defendants Arthur Anderson LLP, C.E. Andrews, Dorsey L. Baskin, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Gregory J. Jonas, Robert G. Kutsenda, Benjamin S. Neuhausen, Richard R. Petersen, Danny D. Rudloff, Steve M. Samek, John E. Sorrells, John E. Stewart, and William E. Swanson Russell (Rusty) Hardin, Jr. Andrew Ramzel Rusty Hardin & Associates, P.C. 1201 Louisiana, Suite 3300 Houston, TX 77002 (713) 652-9000 (713) 652-9800 (fax) Service by e-mail: aramzel@rustyhardin.com	Attorneys for Defendants Arthur Andersen LLP, Dorsey L. Baskin, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Gregory J. Jonas, Robert G. Kutsenda, Benjamin S. Neuhausen, Richard R. Petersen, Danny D. Rudloff, Steve M. Samek, John E. Sorrells, John E. Stewart, and William E. Swanson Sharon Katz sharon.katz@dpw.com Daniel F. Kolb Michael P. Carroll Timothy P. Harkness Davis, Polk & Wardwell 450 Lexington Avenue New York, NY 10017 (212) 450-4000 (212) 450-5649 (fax) (212) 450-3633 (fax for service of papers) Service by e-mail: andersen.courtpapers@dpw.com
Attorneys for Defendants Banc of America Securities LLC and Salomon Smith Barney Inc.: Paul Vizcarrondo, Jr. Wachtell, Lipton, Rosen & Katz 51 West 52nd Street New York, NY 10019 (212) 403-1000 (212) 403-2000 (fax) Service by e-mail: pvizcarrondo@wlrk.com	Attorneys for Defendant Andersen Worldwide, S.C.: William Edward Matthews Gardere Wynne Sewell LLP 1000 Louisiana, Suite 3400 Houston, TX 77002 (713) 276-5500 (713) 276-5555 (fax) Service by fax

Attorneys for Defendants Vinson & Elkins, L.L.P., Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick, III: John K. Villa Williams & Connolly, LLP 725 Twelfth Street, N.W. Washington, DC 20005 (202) 434-5000 (202) 434-5029 (fax) Service by e-mail: jvilla@wc.com	Attorneys for Defendant Citigroup, Inc. and Salomon Smith Barney, Inc.: Jacalyn D. Scott Wilshire Scott & Dyer P.C. 3000 One Houston Center 1221 McKinney Houston, TX 77010 (713) 651-1221 (713) 651-0020 (fax) Service by e-mail: jscott@wsd-law.com
Attorneys for Defendant David B. Duncan: Barry G. Flynn Law Offices of Barry G. Flynn, PC 1300 Post Oak Blvd., Suite 750 Houston, TX 77056 (713) 840-7474 (713) 840-0311 (fax) Service by e-mail: bgflaw@mywavenet.com	Attorneys for Defendant LJM2 Coinvestments, LP: Mark A. Glasser Reginald R. Smith King & Spalding 1100 Louisiana, Suite 4000 Houston, TX 77002-5213 (713) 751-3200 (713) 751-3290 (fax) Service by e-mail: mkglasser@kslaw.com
Attorneys for Defendant Ben F. Glisan, Jr.: Tom P. Allen McDaniel & Allen, APC 1001 McKinney Street, 21st Floor Houston, TX 77002 (713) 227-5001 (713) 227-8750 (fax) Service by e-mail: tallen@mcdanielallen.com	Attorneys for Defendant Kristina Mordaunt: Robert Hayden Burns Burns Wooley & Marseglia 1415 Louisiana, Suite 3300 Houston, TX 77002 (713) 651-0422 (713) 651-0817 (fax) Service by e-mail: hburns@bwmzlaw.com

Attorneys for Defendant Michael C. Odom: Bernard V. Preziosi, Jr. Curtis, Mallet-Prevost, Colt & Mosle, L.L.P. 101 Park Avenue New York, NY 10178-0061 (212) 696-6000 (212) 697-1559 (fax) Service by e-mail: bpreziosi@cm-p.com	Attorneys for Defendant Kirkland & Ellis: Kevin S. Allred Kelly M. Klaus Munger, Tolles & Olson 355 South Grand Avenue, 35th Floor Los Angeles, CA 90071 (213) 683-9100 (213) 687-3702 (fax) Service by e-mail: allredks@mto.com
Attorneys for Defendant D. Stephen Goddard, Jr.: Michael D. Warden Sidley Austin Brown & Wood, LLP 1501 K Street, N.W. Washington, DC 20005 (202) 736-8000 (202) 736-8711 (fax) Service by e-mail: mwarden@sidley.com	Roman W. McAlindan The Sharrow 34 Lickey Square Barnt Green, Rednal, Birmingham, B45 8HB Great Britain Service by Federal Express
Attorneys for Defendant Thomas H. Bauer: Scott B. Schreiber Arnold & Porter 555 Twelfth Street, N.W. Washington, DC 20004-1206 (202) 942-5000 (202) 942-5999 (fax) Service by e-mail: enroncourtpapers@aporter.com	Attorneys for Defendant Nancy Temple: Mark C. Hansen Reid M. Figel Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. 1615 M Street, N.W., Suite 400 Washington, DC 20036 (202) 326-7900 (202) 326-7999 (fax) Service by e-mail: mhansen@khte.com rfigel@khte.com

Attorneys for Defendant Alliance Capital Management: Ronald E. Cook Cook & Roach, LLP Chevron Texaco Heritage Plaza 1111 Bagby, Suite 2650 Houston, TX 77002 (713) 652-2031 (713) 652-2029 (fax) Service by e-mail: rcook@cookroach.com	Attorneys for American National Plaintiffs: Andrew J. Mytelka David Le Blanc Greer, Herz & Adams, L.L.P. One Moody Plaza, 18th Floor Galveston, TX 77550 (409) 797-3200 (409) 766-6424 (fax) Service by e-mail: amytelka@greerherz.com dleblanc@greerherz.com bnew@greerherz.com swindsor@greerherz.com
Attorneys for Defendant Lou L. Pai: Murray Fogler McDade Fogler Maines, L.L.P. Two Houston Center 909 Fannin Suite 1200 Houston, Texas 77010-1006 (713) 654-4300 (713) 654-4343 (fax) Service by fax	Attorneys for Defendant Lou L. Pai: Roger E. Zuckerman Steven M. Salky Deborah J. Jeffrey 1201 Connecticut Avenue, N.W. Washington, D.C. 20036-2638 (202) 778-1800 (202) 822-8106 (fax) Service by e-mail: djeffrey@zuckerman.com
Philip A. Randall Andersen United Kingdom 180 Strand London WC2R 1BL England 44 20 7438 3000 44 20 7831 1133 (fax) Service by fax	Attorneys for Defendant Deutsche Bank AG: Lawrence Byrne Owen C. Pell Lance Croffoot-Suede White & Case, LLP 1155 Avenue of the Americas New York, New York 10036-2787 (212) 819-8200 Service by e-mail lbyrne@whitecase.com

Attorneys for Defendant Bank of America Corporation: Paul Bessette Brobeck, Phleger & Harrison, LLP 4801 Plaza on the Lake Austin, Texas 78746 (512) 330-4000 (512) 330-4001 (fax) Service by e-mail: pbessette@brobeck.com	Attorneys for Defendant Bank of America Corp.: Gregory A. Markel Ronit Setton Nancy Ruskin Brobeck, Phleger & Harrison LLP 1633 Broadway, 47th Floor New York, NY 10019 (212) 581-1600 (212) 586-7878 (fax) Service by e-mail: gmarkel@brobeck.com rsetton@brobeck.com nruskin@brobeck.com
Michael D. Jones Andersen United Kingdom 180 Strand London WC2R 1BL England 44 20 7438 3000 44 20 7831 1133 (fax) Service by fax	Attorneys for Defendant Alliance Capital Management: Mark A. Kirsch James F. Moyle James N. Benedict Clifford Chance Rogers & Wells 200 Park Avenue, Suite 5200 New York, NY 10166 (212) 878-8000 (212) 878-8375 (fax) Service by e-mail: james.moyle@cliffordchance.com james.benedict@cliffordchance.com mark.kirsch@cliffordchance.com

Attorneys for Defendant J.P. Morgan Chase & Co.: Richard Mithoff Mithoff & Jacks One Allen Center, Penthouse 500 Dallas Houston, TX 77002 (713) 654-1122 (713) 739-8085 (fax) Service by e-mail: enronlitigation@mithoff-jacks.com	Attorneys for Defendant J.P. Morgan Case & Co.: Bruce D. Angiolillo Thomas C. Rice Jonathan K. Youngwood Simpson Thacher & Bartlett 425 Lexington Avenue New York, NY 10017-3954 (212) 455-2000 (212) 455-2502 (fax) Service by e-mail: bangiolillo@stlaw.com trice@stblaw.com jyoungwood@stblaw.com
Attorneys for Defendant Credit Suisse First Boston Corp.: Lawrence D. Finder Haynes and Boone, LLP 1000 Louisiana Street, Suite 4300 Houston, TX 77002-5012 (713) 547-2006 (713) 547-2600 (fax) Service by e-mail: finderl@haynesboone.com	Attorneys for Defendant Barclays Bank PLC: David H. Braff Sullivan & Cromwell 125 Broad Street New York, NY 10004-2498 (212) 558-4000 (212) 558-3588 (fax) Service by e-mail: braffd@sullcrom.com candidoa@sullcrom.com brebnera@sullcrom.com
Attorneys for Defendant J.P. Morgan Chase & Co.: Chuck A. Gall James W. Bowen Jenkens & Gilchrist 1445 Ross Avenue, Suite 3200 Dallas, TX 75202-2799 (214) 855-4338 (214) 855-4300 (fax) Service by e-mail: cgall@jenkens.com jbowen@jenkens.com	Attorneys for Defendant Credit Suisse First Boston Corp.: Richard W. Clary Julie A. North Cravath, Swaine & Moore 825 Eighth Avenue New York, NY 10019 (212) 474-1000 (212) 474-3700 (fax) rclary@cravath.com

Attorneys for Defendant Merrill Lynch & Co., Inc.: Taylor M. Hicks Hicks Thomas & Lilienstern, LLP 700 Louisiana, Suite 1700 Houston, TX 77002 (713) 547-9100 (713) 547-9150 (fax) Service by e-mail: thicks@hicks-thomas.com	Attorneys for Defendant Barclays Bank PLC: Barry Abrams Abrams Scott & Bickley, LLP JP Morgan Chase Tower 600 Travis, Suite 6601 Houston, TX 77002 (713) 228-6601 (713) 228-6605 (fax) Service by e-mail: babrams@asbtexas.com
John L. Murchison, Jr. Vinson & Elkins, L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002 (713) 758-2222 (713) 758-2346 (fax) Service by e-mail: jmurchison@velaw.com	Attorneys for Defendant Citigroup: Brad S. Karp Mark F. Pomerantz Richard A. Rosen Michael E. Gertzman Claudia L. Hammerman Paul, Weiss, Rifkind, Wharton & Garrison 1285 Avenue of the Americas New York, NY 10019-6064 (212) 373-3000 (212) 757-3990 (fax) Service by e-mail: grp-citi-service@paulweiss.com
Andersen LLP (Andersen-Cayman Islands) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express	Arthur Andersen (Andersen-United Kingdom) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express
Andersen Co. (Andersen-India) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express	Lehman Brothers Holding, Inc. c/o Thomas A. Russo 745 Seventh Avenue New York, NY 10019 (212) 526-7000 (212) 526-2628 (fax) Service by fax

Attorneys for Defendant Canadian Imperial Bank of Commerce: Alan N. Salpeter Michele Odorizzi T. Mark McLaughlin Andrew D. Campbell Mayer, Brown, Rowe & Maw 190 South LaSalle St. Chicago, IL 60603 (312) 782-0600 (312) 706-8680 (fax) William H. Knull, III Mayer, Brown, Rowe & Maw 700 Louisiana Street, Suite 3600 Houston, Texas 77002-2730 (713) 221-1651 (713) 224-6410 (fax) Service by e-mail: cibc-newby@mayerbrownrowe.com	Arthur Andersen-Puerto Rico (Andersen-Puerto Rico) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express
Arthur Andersen-Brazil 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express	Attorney for Joseph Sutton: Jack O'Neill Clements, O'Neill, Pierce, Wilson & Peterson 1000 Louisiana, Suite 1800 Houston, Texas 77002 (713) 654-7600 (713) 654-7690 Service by e-mail: oneilljack@copwf.com

Roger D. Willard 3723 Maroneal Street Houston, TX 77025 Service by Federal Express	Additional Counsel for Defendant Joseph Hirko: Barnes H. Ellis David H. Angeli STOEL RIVES LLP 900 SW 5th Avenue, Suite 2600 Portland, Oregon 97204 (503) 224-3380 (phone) (503) 220-2480 (fax) Service by e-mail: dhangeli@stoel.com
Additional Counsel for Kevin Hannon: Stephen J. Crimmins PEPPER HAMILTON LLP Hamilton Square 600 Fourteenth Street, N.W. Washington, D.C. 20005 (202) 220-1200 (202) 220-1665 (Fax) Elizabeth T. Parker PEPPER HAMILTON LLP 3000 Two Logan Square 18th and Arch Streets Philadelphia, PA 19103 (215) 981-4000 (215) 981-4756 (Fax) Service by e-mail: crimminss@pepperlaw.com parkere@pepperlaw.com	Attorneys for Defendants Richard B. Buy, Richard A. Causey, Mark A. Frevert, Stanley C. Horton, Kevin Hannon, Joseph Hirko, Steven Kean, Mark E. Koenig, Michael S. McConnell, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Paula Rieker, and Lawrence Greg Whalley Jacks C. Nickens Paul D. Flack Nickens, Lawless & Flack 1000 Louisiana, Suite 5360 Houston, Texas 77002 (713) 571-9191 (713) 571-9652 (fax) Service by e-mail trichardson@nlf-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION NO. H-01-3624
	§	(Consolidated)
ENRON CORP., et al.,	§	
Defendants	§	

ORDER

Having considered the motion to dismiss filed by Defendant Richard B. Buy and all materials filed in support of and in opposition to this motion, and finding that the Complaint fails to state a claim against this Defendant upon which relief can be granted,

It is hereby ORDERED that:

1. Defendant's motion is GRANTED, and

2. The claims against Defendant Richard B. Buy are DISMISSED with prejudice.

SIGNED this _____ day of _____, 2002.

_____
Melinda Harmon
United States District Judge